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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-188

MELLON BANK, N.A.,
Petitioner,

v.

SOUTHLAND MOBILE HOMES OF SOUTH CAROLINA, INC.

and

ASSOCIATES FINANCIAL SERVICES COMPANY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of South Carolina

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BRIEF IN OPPOSITION OF ASSOCIATES FINANCIAL SERVICES COMPANY, INC.

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BRIEF IN OPPOSITION OF ASSOCIATES FINANCIAL SERVICES COMPANY, INC.

QUESTION PRESENTED

Whether the Supreme Court of South Carolina properly applied and interpreted federal law in determining that petitioner was conducting branch banking activities in Sumter County, South Carolina.

COUNTERSTATEMENT OF THE CASE

This action arises out of petitioner Mellon Bank, N.A.'s ("Mellon"), financing plan entitled "The Mellon Bank Mobile Home Service Program." Respondent Southland Mobile Homes of South Carolina, Inc. ("Southland"), participated in this program. Respondent Associates Financial Services Company, Inc. ("Associates"), was the South Carolina agent for petitioner Mellon and obtained clients such as Southland for Mellon.

On December 20, 1972, Associates and Mellon executed an agreement under which Associates agreed to seek out mobile home dealers "in locations designated to Associates from time to time in writing by the Bank," [1] from whom Mellon could acquire time-sale agreements for the retail purchase of mobile homes. The stated purpose of the agreement was to assist Mellon in "further develop[ing] its retail mobile home financing business . . . ." [2] Pursuant to this agreement, Southland, an operator of mobile home retail sales lots in South Carolina, was induced to enter into The Mellon Bank Mobile Home Service Program with Mellon. Thereafter, Mellon directly financed a large number of Southland's mobile home sales under its mobile home program.

Under this program, Southland would receive only one-half of the proceeds from Mellon. The other half was held in a reserve account by Mellon. After six months, Mellon would release to Southland the remaining half, less a two percent contingency fund. Because this procedure was apparently creating tax problems, the president of Southland asked Associates to persuade Mellon to limit or "cap" his reserve "with Mellon Bank at $20,000," in

[1] Agreement between Associates Financial Services Company, Inc., and Mellon Bank, N.A., at 1 ("Agreement").

[2] Agreement at 1.

return for a personal guarantee running to Mellon and additional security.[3] On August 29, 1973, Mellon agreed to limit Southland's reserve to $20,000 and to release the excess reserve funds in return for a guarantee running to Mellon to honor chargebacks in excess of $20,000.[4] Although the guarantee Mellon requested was executed and delivered, Mellon thereafter reneged on its agreement.[5] This action by Southland for breach of contract followed.[6]

ARGUMENT

THE SUPREME COURT OF SOUTH CAROLINA PROPERLY APPLIED FEDERAL LAW AND CORRECTLY INTERPRETED THE DECISIONS OF THIS COURT IN FINDING THAT MELLON ENGAGED IN BRANCH BANKING IN SOUTH CAROLINA.

The petition's characterization of this case is involving "an attempt by the state courts of South Carolina to assert jurisdiction over an out-of-state national bank pur-

[3] Letter from W. R. Sanford, President, Southland Mobile Homes of South Carolina, Inc., to Arthur H. Henderson, Assistant Vice-President, Associates Financial Services Company, Inc., August 9, 1973, at 2 (exhibit attached to affidavit of Bruce Gordon, Operations Manager, Associates Financial Services Company, Inc., January 13, 1977 ("Gordon affidavit").

[4] Letter from M. H. Van Dyke, Assistant Vice-President, Mellon Bank, to John D. Boyd, Senior Vice-President, Associates Financial Services Company, Inc., August 29, 1973 (exhibit attached to Gordon affidavit).

[5] Letter from M. H. Van Dyke to John D. Boyd, March 4, 1974 (exhibit attached to Gordon affidavit).

[6] Southland averred in its complaint that, in reliance upon Mellon's agreement to cap its reserves, it expended large sums of money to open additional mobile home retail sales lots. When this money was not forthcoming from Mellon, Southland had to close these new lots, as well as certain of its original lots. Within one year, Southland ceased doing business.

suant to a state long-arm statute," [7] is an unfair and inaccurate description of the decisions of both of the South Carolina courts as even a casual reading of their opinions clearly reveals. The Court of Common Pleas for Sumter County and the South Carolina Supreme Court based their decisions that they had jurisdiction over Mellon on the definition of "branch" as defined by § 7(f) of the McFadden Act, 12 U.S.C. § 36(f), as interpreted by this Court's decisions in *Citizens & Southern National Bank* v. *Bougas*, 434 U.S. 35 (1977), and *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969). Only after it found that Mellon engaged in branch banking activities in Sumter County, South Carolina, within the meaning of § 36(f) and *First National Bank in Plant City* v. *Dickinson, supra*, so that it was not prevented by federal law from hearing the case, did the Court of Common Pleas go on to find that because of Mellon's substantial and significant contacts with the state, it had personal jurisdiction over Mellon under state law. Indeed, the Supreme Court of South Carolina specifically observed that "[b]oth jurisdiction and venue in actions against national banks are governed by federal statutes." [8]

The order of the Court of Common Pleas, confirming jurisdiction over Mellon, stated that the record:

> . . . conclusively shows that the Bank had full control of all activities of Associates insofar as any procedures connected with the Associates' handling of Mellon's loans in this State. It further appears that Associates was merely a service company and Mellon's agent for the consummation of the various transactions upon which this action is founded . . . .

[7] Petition for Writ of Certiorari at 5.

[8] Appendix ("App.") at 19.

> * * * *
>
> Without question the exhibits and evidence presented establish that the Associates' office in Sumter, South Carolina, received checks made payable to the Mellon Bank, that it loaned money of the Mellon Bank and conducted all business necessary to be completed with the receipt of the funds and the disbursement of them pursuant to explicit directions of the Mellon Bank as to all places [sic] of procedure. Upon a review of all of the facts it would appear that branch banking was in fact taking place at the Associates' office for the benefit of Mellon throughout the tenure of the contract between these Defendants.[9]

The South Carolina Supreme Court affirmed.[10]

Mellon's high degree of involvement in and control over these transactions leave no doubt but that Associates was a "branch" or a "branch agent" of Mellon for the purpose of providing Mellon's money for the financing of mobile homes. The express purpose of the agreement between Associates and Mellon was to assist Mellon "further [to] develop its retail mobile home financing business . . . ." [11] Under the agreement, Mellon designated those geographic areas wherein Associates should seek mobile home dealers with whom to deal and Mellon approved each such dealer.[12] Furthermore, Mellon had the right to approve all credit applications and all matters relating to maximum limita-

[9] Order of the Court of Common Pleas for Sumter County, February 16, 1977, App. at 27-28, 29.

[10] Southland Mobile Homes of South Carolina, Inc. v. Associates Financial Services Company, Inc., No. 20655 (Supreme Court, April 3, 1978), App. at 17.

[11] Agreement at 1.

[12] Agreement at 1.

tions for payment. Also, Mellon owned all sales financed transactions.[13] Indeed, the very name of this financing program was "The Mellon Bank Mobile Home Service Program." Thus, the entire thrust of the operation was to develop Mellon's mobile home financing business, and Associates was a Mellon servicing organization subject to absolute Mellon control insofar as Mellon's loans in South Carolina were concerned.[14]

In this case, Mellon was not merely purchasing commercial paper in South Carolina from others who had already financed mobile home purchases as the petition suggests. To the contrary, Mellon was in name and fact the primary lender whose funds financed the purchase of the mobile homes. No other funds were involved. Mellon held back a portion of the financing from Southland to create a loss reserve in its favor, the attempted alteration of which generated this litigation.[15] The liens on the financed mobile homes were in Mellon's name and payments were made directly to Mellon.

In light of these facts, the South Carolina Supreme Court correctly applied this Court's decision in *First National Bank in Plant City* v. *Dickinson*, *supra*. There, as here, the issue was whether certain activities of a

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[13] Gordon affidavit at 1.

[14] Order of the Court of Common Pleas, Sumter County, February 16, 1977, App. at 27; Gordon affidavit at 1.

[15] Mellon's total control over these funds is illustrated in the correspondence between Associates and Mellon in which Associates recommended that Mellon limit Southland's reserve to $20,000 and even offered to cut its agent's fee "by .1% per annum and increase the Mellon Bank net rate by a similar amount if you will agree to a maximum reserve of $20,000 . . . ." Letter from John D. Boyd, Senior Vice-President of Associates, to M. H. Van Dyke, Assistant Vice-President of Mellon, December 20, 1973 (exhibits attached to Gordon affidavit).

bank constituted branch banking within the meaning of § 7 of the McFadden Act, 12 U.S.C. § 36. This Court held that the bank's operation of an armored car service to cash checks and accept deposits and its establishment of an off-premises receptacle for the receipt of packages containing cash or checks for deposit constituted branch banking activities.

The Court observed that the McFadden Act's definition of a "branch" [16] bank defines only "the minimum content," and not "the outer limits of the term." [17] Thus, it held that ". . . the term 'branch bank' at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more." [18] In *Plant City*, deposits were "received" by a bank at a location different from its chartered place of business. Here, Mellon's money was loaned from a location other than Mellon's chartered premises, and, at that same place, checks payable to Mellon Bank were accepted, all subject to express directions from Mellon. In both instances, the facility where the actual exchange of money occurs constitutes a branch. 396 U.S. at 137.[19]

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[16] The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid or money lent.

[17] 396 U.S. at 135.

[18] *Id.* (emphasis in original). The Court relied in part upon Representative McFadden's description of the definition of "branch" bank during the congressional debates:

> Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office, is a branch. 68 Cong. Rec. 5816 (1927).

396 U.S. at 134 n. 8.

[19] The Plant City bank attempted to avoid a determination that it was engaging in branch banking by use of an agency agreement

In *Independent Bankers Association of Georgia* v. *Board of Governors of the Federal Reserve System*, 516 F.2d 1206 (D.C. Cir. 1975), the court held that a national bank would be engaging in branch banking if it made mortgage loans through a separately incorporated subsidiary specializing in mortgages. The question, the court stated, is whether "in substance" the national bank "is doing business through the instrumentality of" another institution.[20] Because the mortgage company, although a different corporate entity, was "engaged in a type of activity embraced by § 36(f)—*i.e.*, lending money," [21] the court held that it must be considered a branch of the national bank under the McFadden Act. *See also, Central Bank* v. *Smith*, 532 F.2d 37 (7th Cir. 1976); *Whitney National Bank* v. *Bank of New Orleans*, 323 F.2d 290 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965); *First National Bank* v. *First Bank Stock Corporation*, 306 F.2d 937 (9th Cir. 1962).

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which provided that the bank acted as agent of the customer for all off-premises banking activities and the customers' money was not deemed to be a deposit until delivered to the bank's tellers at the home office. Here, in the agreement between Mellon and Associates, Mellon attempted to disclaim any branch banking activities by providing that "this agreement shall not create in any manner or in any circumstances an employer-employee relationship, joint venture or partnership between the Bank and Associates." Agreement at 6. The Supreme Court in *Plant City, supra*, experienced no difficulty penetrating such an agreement, stating that "while the contracting parties are free to arrange their private rights and liabilities as they see fit, it does not follow that private contractual arrangements, binding on the parties under state law, determine the meaning of the language or the reach of § 36(f)." 396 U.S. at 136. "It is the nature of the arrangement, and not the label applied to it, that determines the character of the relationship between two banking institutions." Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 323 F.2d 290, 301 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965).

[20] 516 F.2d at 1223.

[21] 516 F.2d at 1222 n. 68.

Petitioner argues that Mellon is not "located" in the State of South Carolina within the meaning of 28 U.S.C. § 1348,[22] which controls jurisdiction, and 12 U.S.C. § 94,[23] which controls venue. Under the jurisdiction statute, Mellon is deemed a citizen of South Carolina, and subject to the jurisdiction of that state's courts, if it is located there. Venue would then be proper in "any State, county, or municipal court . . . having jurisdiction in similar cases" where Mellon is located. However, since both this Court and the South Carolina Supreme Court have held that a national bank is located in any county in which it has a branch bank,[24] petitioner's argument obviously is but a restatement of the previous contention that Mellon is not engaging in branch banking in the county.

Michigan National Bank v. *Robertson*, 372 U.S. 591 (1963), upon which Mellon relies, is inapposite. The Nebraska court did not find the national bank in that case to be engaged in branch banking in the state, and indeed this issue was not even present in the case. This Court merely held that unless the provisions of 12 U.S.C. § 94 are waived, it precludes a suit against a non-resident

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[22] The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

[23] Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

[24] Citizens & Southern National Bank v. Bougas, 434 U.S. 35 (1977); Holson v. Gosnell, 264 S.C. 619, 216 S.E.2d 539 (1975), *cert. denied*, 423 U.S. 1048 (1976).

national bank for violating state usury laws.[25] The Court remanded for a determination on the waiver question.

Finally, as petitioner concedes, the South Carolina Supreme Court did not decide the issue whether Mellon waived its purported immunity from suit in South Carolina. That question, therefore, is not before this Court. *National Bank of North America* v. *Associates of Obstetrics and Female Surgery, Inc.*, 425 U.S. 460 (1976); *Michigan National Bank* v. *Robertson*, 372 U.S. 591 (1963).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[25] Similarly, neither Bank of America v. Whitney, 261 U.S. 171 (1923), nor National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc., 425 U.S. 460 (1976), involved branch banking activity. If so engaged, Mellon was "located" in South Carolina and amenable to its process. First National Bank in Plant City v. Dickinson, *supra*. The factual predicate for petitioner's argument, *i.e.*, ". . . all Mellon Bank did was purchase chattel paper from Associates, which had acquired the paper from Southland . . ." (petition at 8), is accurate as shown above and was not accepted by the courts below.

CERTIFICATE OF SERVICE

I hereby certify that I have caused three copies of the foregoing Brief in Opposition of Associates Financial Services Company, Inc., to be served upon each of the parties to this proceeding in accordance with Rule 33.1 of the Rules of this Court.

Dated at Washington, D.C., this 1st day of September, 1978.

GEORGE B. MICKUM, III
Counsel for Respondent
Associates Financial Services
Company, Inc.